IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. BEVERLY DIANE BEAN

Appeal from the Circuit Court for Franklin County
No. 16643 Thomas W. Graham, Judge

No. M2006-02308-CCA-R3-CD - Filed November 14, 2007

A Franklin County Circuit Court grand jury indicted the defendant, Beverly Diane Bean, of driving under the influence (DUI), third offense, a Class A misdemeanor, *see* T.C.A. §§ 55-10-401, -403(a)(1) (2004); DUI, *see id.* § 55-10-401; violating the implied consent law, *see id.* § 55-10-406; and reckless driving, *see id.* § 55-10-205. The jury convicted the defendant of DUI, count one, and reckless driving, count four. The trial court found the defendant guilty of third offense DUI, *see id.* § 55-10-403(a)(1), count two. The trial court sentenced the defendant to an effective sentence of 11 months and 29 days, six months to be served in the county jail and the remainder on supervised probation, and the court imposed a fine of $1,100. On appeal, the defendant argues that there was insufficient evidence to support the DUI conviction and that the trial court's sentence was excessive. We hold the evidence sufficient and uphold the sentence. However, we remand for correction of the judgments.

Tenn. R. App. P. 3; Judgments of the Circuit Court are Affirmed in part; Case Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Francis W. Pryor, Jr., Jasper, Tennessee, for the appellant, Beverly Diane Bean.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; James Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts at trial showed that in the early morning hours of September 8, 2005, the defendant drove north on Highway 127 in Franklin County. Decherd Police Officer Troy Clark, whose patrol car was not equipped with video equipment, followed the defendant and observed her cross the highway centerline twice for several seconds each time. The defendant then turned right

onto Shelley Road, and "[s]he had her tires on the [right] white line following it. She never let her tires off of it." This continued for approximately one-fourth mile. Officer Clark testified that the defendant turned her right blinker on, we discern, after turning onto Shelley Road. She left the blinker on for approximately one-fourth mile; however, there was no place to turn right, according to Officer Clark. The defendant eventually turned into an abandoned house's driveway, which Officer Clark was familiar with. At that point, Officer Clark pulled his patrol car behind the defendant's vehicle and turned on his blue lights.

Officer Clark asked for the defendant's license, and he testified that he smelled alcohol coming from the defendant's person. He asked her to step out of her car, and he stated that "[s]he was unsteady on her feet." Officer Clark also asked the defendant if she had been drinking, and she denied drinking but admitted taking two pills for anxiety. Thus, he asked her to perform several field sobriety tests.

Officer Clark testified that the defendant performed the "nine step walk and turn" test. He testified that she "missed heel to toe all nine times[,] . . . [s]tepped off the line on the seventh step[,] . . . [and r]aised her arms approximately half way, trying to keep her balance." After she turned, she missed heel to toe on the nine steps back, stepped off the line on the third and ninth step, and continuously raised her arms for balance although she was instructed to keep her arms at her side.[1] Officer Clark also testified that the defendant failed the "one leg" stand test because she lowered her raised foot to the ground at eight, ten, and 15 seconds although she was supposed to keep it raised until he told her to stop. She also raised her arms to keep balanced even though they were to remain at her side. Finally, Officer Clark testified that the defendant failed the "Rohmberg" test. She was supposed to keep her head tilted back for an estimated 30 seconds, but she stopped after 15 seconds. On the second try, she stopped after 18 seconds.

Because she failed the field sobriety tests, Officer Clark placed her under arrest for DUI, read her the implied consent form, and asked her to take a blood test; however, the defendant refused to take the test and refused to sign the implied consent form. Officer Mike White, who responded to the scene shortly after Officer Clark announced the stop on the police radio, observed Officer Clark read her the form and saw her refuse the test and refuse to sign. He testified that in his opinion, the defendant was "impaired." In addition, Franklin County corrections officer Kevin Grant testified that when he booked the defendant, she appeared to be intoxicated.

The defendant testified on her own behalf that she was packing her belongings to move, she took an "ampiline," an anxiety pill at 7:00 p.m., and then she slept for two or three hours. When she awoke, she drove to a Krystal restaurant to purchase a Sundrop drink. She also testified that she suffered from an ear infection and that she put medicine in her ear and placed a cotton ball into it. When driving back to her house from the Krystal restaurant, a car behind her "was blinding [her] to death" with its headlights. Then the car turned on its blue lights, and she pulled over into an abandoned house's driveway. She informed Officer Clark that she had not been drinking, and she

[1] Officer Clark later testified that the line was "imaginary." The defendant performed the test on gravel.

thought she performed well on the field sobriety tests. The defendant also testified that she asked to be taken to the hospital to take a sobriety test.

The jury was presented with count one, DUI, and count four, reckless driving, and it convicted the defendant on both counts. The trial court found the defendant guilty of count two, third offense DUI, and sentenced the defendant to an effective sentence of 11 months and 29 days, six months to be served in the county jail and the remainder on supervised probation, and the court imposed a fine $1,100. On appeal, the defendant argues that there was insufficient evidence to support the DUI conviction and that the sentence was excessive.

I. Sufficiency of the Evidence

The defendant claims that the evidence was insufficient to support her conviction. The State argues that the defendant waived the issue because she failed to cite to the record in the argument section of her brief. *See* Tenn. R. App. P. 27(a)(7) ("The brief of the appellant shall contain . . . [a]n argument . . . with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on . . . ."); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). However, the defendant does cite to the record in other sections of her brief. Thus, we will review the issue.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id*. at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id*.

Tennessee Code Annotated section 55-10-401 proscribes DUI. As is pertinent to the present case, this Code section provides:

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while

> on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
>
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system.
> . . .

T.C.A. § 55-10-401(a)(1) (2004).

The evidence presented in the light most favorable to State showed that the defendant operated a motor vehicle on a public roadway. Officer Clark testified that she failed three field sobriety tests, and three officers testified that the defendant was intoxicated. Furthermore, the State presented two prior convictions, one for DUI in Franklin County committed on November 13, 2003, and one for driving while impaired in Franklin County committed on January 8, 2003.[2] Thus, any rational trier of fact could have found the defendant guilty of third offense DUI beyond a reasonable doubt.

II. Sentencing

The defendant claims that the trial court erred in imposing a sentence above the minimum because of the lack of enhancing factors.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In misdemeanor sentencing, the sentencing court is afforded considerable latitude. *See, e.g., State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999), *perm. app. denied* (Tenn. 2000). A separate sentencing hearing is not mandatory in misdemeanor cases, but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. *See* T.C.A. § 40-35-302(a) (2006). Misdemeanor sentences must be specific and in accordance with the principles, purpose, and goals of the Criminal Sentencing Reform

[2] This offense constitutes a DUI for multiple offense purposes.

Act of 1989. *Id*. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than 75 percent of the sentence should be fixed for a misdemeanor offender; however, a DUI offender may be required to serve 100 percent of her sentence. *Palmer*, 902 S.W.2d at 393-94. A convicted misdemeanant has no presumption of entitlement to a minimum sentence. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

Code section 55-10-403(a)(1) provides the minimum sentence for third offense DUI:

> [T]here shall be imposed a fine of not less than one thousand one hundred dollars ($1,100) nor more than ten thousand dollars ($10,000), and the person or persons shall be confined in the county jail or workhouse for not less than one hundred twenty (120) days nor more than eleven (11) months and twenty-nine (29) days, and the court shall prohibit such convicted person or persons from driving a vehicle in the State of Tennessee for a period of time of not less than three (3) years nor more than ten (10) years.

T.C.A. § 55-10-403(a)(1).

At the sentencing hearing, the defendant admitted that she had ten prior misdemeanor convictions, and the trial court considered these in sentencing although the judge did classify them as "petty." Again, a DUI offender may be required to serve 100 percent of her sentence. *Palmer*, 902 S.W.2d at 393-94. Also, a convicted misdemeanant has no presumption of entitlement to a minimum sentence. *Baker*, 966 S.W.2d at 434; *Creasy*, 885 S.W.2d at 832. Thus, we affirm the sentence.

III. Conclusion

We hold the evidence sufficient and affirm the defendant's sentence. However, we remand for entry of judgments and the correction of judgments. The DUI judgment reflects community service to be performed; however, the trial judge stated at the sentencing hearing that he was "going to waive public service." When there is a conflict between the transcript and the judgment form, the transcript controls. *See, e.g., State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *State v. Jimmy Lee Cullop, Jr.*, No. E2000-00095-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (remanding for correction of sentence alignment in judgment form to conform to alignment reflected in transcript). Assuming that the transcript reflects the

intended sentence, the judgment should be amended. Also, the trial court shall indicate that count two, DUI, will merge with count one, DUI third offense.

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JAMES CURWOOD WITT, JR., JUDGE